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In the

Supreme Court of the United States

October Term, 1965

No. 744

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

THOMAS E. SHROYER,
1341 New Hampshire Ave., N. W.,
Washington, D. C.,
Counsel for Petitioner.

Of Counsel:
JOE P. MATHEWS
903 Dallas Federal Savings Bldg.
Dallas 1, Texas

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—NE 1-3130

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 350 F. 2d 365. The decision and order of the National Labor Relations Board is reported at 144 N.L.R.B. No. 43 (1963).

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on July 12, 1965. A petition for rehearing was denied on September 7, 1965, without written opinion.

Certiorari jurisdiction is conferred upon this court by 28 U.S.C. Sec. 1254(1). This court should exercise its jurisdiction because the Court of Appeals has rendered its decision in conflict with decisions of other Courts of Appeals relating to the same subject matter; because the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court; and because the Court of Appeals has so far departed from accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the National Labor Relations Board as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

(1) Can a party to collective bargaining negotiations properly be found to have "insisted," as a condition of final agreement, upon a topic which is outside the scope of mandatory bargaining, in the absence of any finding by the National Labor Relations Board that such "insistence" was the proximate or proximate or primary cause of an impasse?

(2) Where one topic of non-mandatory bargaining subjects and several topics of mandatory bargaining subjects remain unresolved at the time of an impassee, can it properly be concluded, as a matter of law, that the party proposing the non-mandatory topic has not "insisted" upon the non-mandatory topic as a condition to execution of a final agreement?

(3) May a party to collective bargaining negotiations (who is otherwise found in good faith) lawfully insist, as

a condition to execution of a final agreement, upon the other party providing a surety bond to guarantee faithful performance by the other party of the other party's obligations under the collective bargaining contract?

PERTINENT STATUTES

Section 8(a)(5) of Labor Management Relations Act, 1947, as amended, 28 U.S.C. 158 (a)(5): "It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 8(d) of Labor Management Relations Act, 1947, as amended, 28 U.S.C. 158(d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party * * *."

STATEMENT OF THE CASE

In the period June 4 to October 10, 1962, the parties held six collective bargaining meetings, during which Vicknair and Shanklin were negotiators for the Union and Boone and Dupuy were negotiators for the company. During the second meeting held on June 13, the company presented

to the Union three contract proposals which the company wanted to be included in any final contract. These proposals will hereinafter be referred to as the "performance bond" clause; the "no-strike, no lock-out" clause; and the non-observance of picket lines" clause. The exact wording of these provisions were set forth by the Court of Appeals in Appendix "A" to this petition for certiorari. At each of the bargaining sessions after June 13, the company vigorously bargained for the inclusion of each of the three controversial provisions and the union vigorously resisted agreeing to their inclusion. At the last meeting on October 10, there were still unresolved several topics of mandatory bargaining and the events which transpired during the last meeting can be gathered from the testimony of Vicknair, the chief Union negotiator:

> "At this meeting we knew we had five issues actually that prevented us from having a contract. Again, I would like to say these issues are the No Strike-Lock Out Clause the company wanted; the Performance Bond and the Non-Observance of Picket Lines, their language and we were also trying to have the Union Shop, Check off, Holidays and Wages. At some time during the meeting we were separated by the Federal Conciliator and I asked, I suggested —
>
> "Q. Now, are you going to say what was suggested to the Conciliator or what you suggested to the whole meeting?
>
> "A. At the whole meeting, at one time.
>
> "Q. O.K.
>
> "A. I had suggested that we would drop the Union Shop if the Company would drop the Performance Bond. It was said in the meeting. Then we separated

again and I asked the Conciliator about this if we would drop the Union Shop and the company would drop the Performance Bond, and we hadn't reached agreement anywhere.

"Q. Alright. Before the meeting ended, what position, if any, and what was said concerning — I am talking about the company representatives now — the Non-Observance of Picket Lines, the No Strike Clause and the Performance Bond?

"A. Before we were adjourned we were all called back together by Mr. Mapp. We told the company that they would hear from us, meaning either for a meeting or something else and the company insisted at that time they must have the Performance Bond, the Non-Observance of Picket Lines plus the No Strike-Lock Out Clause as suggested by the company. Then the meeting broke and I filed charges against the company." (Appendix to Petitioner's Brief in the Court of Appeals, pages 37-38)

Whereupon, charges were indeed filed with the Board by the Union. The Trial Examiner, the entire Board and the Court of Appeals found petitioner guilty of violating section 8(a)(5) of the Act because the company representatives used words of "insistence" to describe its position regarding the performance bond topic during the various bargaining sessions and because petitioner's position regarding the performance bond remained the same during the meeting of October 10, which resulted in an impasse.

Neither the Trial Examiner nor the entire Board made any attempt to make a finding or conclusion that petitioner's "insistence" on the performance bond *caused the impasse.* (Transcript of Record used in Court below, pages 51-54 and

78-79.) At the conclusion of the last meeting there admittedly were unresolved the following topics of mandatory bargaining: Union shop provision for the union; check off provision for the union; holidays; wages; the no strike-no lock out clause for the company; and the non-observance of picket lines clause for the company. Therefore, at the conclusion of the last meeting there were actually six topics of mandatory bargaining which were still in dispute and only one topic of non-mandatory bargaining, if the performance bond actually be regarded as a non-mandatory topic of bargaining.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Questions No. 1 and 2

Questions 1 and 2 present issues having general significance far beyond the factual situation in which they arise in this case. These questions present issues and principles of general impact upon both unions and employers throughout this country. While this court has previously established the principle that certain subjects are outside the scope of mandatory bargaining and the principle that while a party may "propose" a non-mandatory subject of bargaining, it does not follow that the party "can lawfully insist upon them as a condition to any agreement." (*N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823). However, neither this Court nor any of the Courts of Appeals have attempted to definitively establish any yard stick or standard by which "proposing"

a clause is to be differentiated from "insisting" upon a clause. In the instant case, the Trial Examiner, the entire Board and the Court of Appeals for the Fifth Circuit in this particular case. Petitioner feels that common sense and fundamental justice dictate that a party is permitted to "propose" or "insist" upon a non-mandatory topic until and unless the "insistence" *causes* the bargaining negotiations to reach an impasse. Since this Court established the principle of non-mandatory bargaining topics, petitioner feels it is now the duty of this Court to fill the "gap" which now exists, in order to guide both parties to collective bargaining negotiations.

Such authority as does exist conflicts, in petitioner's viewpoint, with the approach taken by the Court of Appeals in this case.

The facts under which this Court decided *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, supra, show that the Board conclusively established *ultimate* insistence. See, the following from this Court's opinion:

> "On April 21, the Unions asked the company whether the latter would withdraw its demand for the 'ballot' and 'recognition' clauses if the Unions accepted *all other pending requirements of the company. The company declined* and again insisted upon acceptance of its 'package' containing both clauses. Finally, on May 5, the Local * * * gave in and entered into an agreement containing both controversial clauses." (Emphasis supplied)

The Union made no such offer in the case at Bar to accept the company's position on all mandatory topics of

bargaining, if the company would drop its demand for the performance bond. Indeed, the facts conclusively establish that at the time of impasse there were at least six unresolved topics of mandatory bargaining which were in issue, along with the separate topic of the performance bond.

Philip Carey Mfg. Co. v. N.L.R.B., 6th Cir. 1964, 331 F. 2d 720, 727, 728, involved a situation similar to the case at bar in that the employer had proposed a provision (super-seniority) which was held by the Board and the Court to be a non-mandatory topic of bargaining. An impasse resulted and bargaining negotiations were terminated. In contrast, however, the Board and the Court in *Philip Carey* clearly seemed to recognize the necessity for establishing a *causal relationship* between the company's "insistence" on a non-mandatory provision and the impasse reached in bargaining negotiations. See the following from the Court's opinion:

> "The Board found that the Company insisted on the inclusion of this provision in any contract it might sign *and that this insistence caused the bargaining negotiations to reach an impasse* on December 28 * * *.
>
> "The next important meeting for our purposes, was held November 22-23. The Trial Examiner found that at this meeting disagreement was centered on two issues: the Company's super seniority proposal and the Union's insistence that all strikers be reinstated; and that the other issues had become less significant.
>
> "Both the Examiner and the Board passed over the November meeting and *concluded that the Company's insistence on super seniority caused an impasse* (and thus converted the strike into an unfair labor practice strike) at the next meeting, held on December 28." (Emphasis supplied)

Philip Carey, supra, was cited by the Court of Appeals in the instant case to support its decision on this point, although petitioner is totally unable to see how *Philip Carey* does anything except contradict the Court of Appeals in this case. The Court of Appeals in this case also cited *Industrial Union of Marine & Shipbuilding Workers v. N.L.R.B.*, 3rd Circuit, 1963, 320 F. 2d 615, 618 as supporting the position of the Court of Appeals in this case. All that *Industrial Union* said was merely:

> "It was not necessary for the Board to find that the Company's insistence on this proposal was the *sole* cause of the failure to reach agreement." (Emphasis supplied)

Industrial Union clearly seems to recognize that some *causal relationship* must be found between the "insistence" on a non-mandatory topic and the failure to reach an agreement.

Two other decisions by Courts of Appeals seems not only to support petitioner's viewpoint that a causal relationship must be established between "insistence" on non-mandatory topics and the reaching of an impasse but these cases also go even further and support petitioner's position regarding Question No. 2 now being presented to this court. These last two mentioned cases hold that where both non-mandatory topics of bargaining remain unresolved at the time of an impasse, the impasse must, as a matter of law, be regarded as attributable to failure of the parties to reach agreement on the mandatory topics of bargaining.

In *Radiator Specialty Co. v. N.L.R.B.*, 4th Circuit, 1964, 336 F. 2d 495, 500, the Court stated:

"Either alone or in conjunction with a concededly mandatory item, it (a controversial liability clause proposed by the Company) cannot be treated as a factor of impasse in the negotiations. At the end the parties were unagreed upon wages, arbitration, seniority and overtime. Regardless of other concessions and recessions, *neither party would relent on wages. This was their prerogative and privilege, but, nevertheless, it was the cause of the bargaining failure.*" (Parenthetical explanation and emphasis supplied).

The second circuit in *N.L.R.B. v. Superior Fire Proof Door & Sash Co., Inc.*, 289 F. 2d 713 stated:

> "The record does not warrant a conclusion that respondent did that (insist upon non-mandatory topics as a condition to any agreement); these (non-mandatory topics) were among the many items yet unresolved when the walk-out of June 17 ended the bargaining period." (Parenthetical explanation and emphasis supplied).

Question No. 3

This Court has never decided the question of whether a performance bond to insure the faithful performance of the provisions of a collective bargaining contract is a subject of mandatory bargaining or is outside the scope of mandatory topics.

In 1954, the Court of Appeals for the Fifth Circuit held a performance bond to be a subject of mandatory bargaining.

N.L.R.B. v. I.B.S. Mfg. Co., 210 F. 2d 634, the following being a direct quotation from Footnote 3 of such opinion:

> "It seems equally clear that the employer had the right to insist upon penalties which would be imposed upon the union only if it would violate its contract."

The Court of Appeals for the Fifth Circuit in the case at bar silently, but nevertheless effectively, overruled its own prior decision by citing the dissenting opinion in *I.B.S. Mfg.*, supra. See, Footnote 7 of the lower Court's opinion in the case at bar.

Only one other Court of Appeals decision has squarely passed upon the question of whether a performance bond is a mandatory subject of bargaining; such decision was by the Court of Appeals for the District of Columbia; the majority opinion held a performance bond to be outside the scope of mandatory bargaining; however, the decision was a 2-1 opinion, with a vigorous dissent written by Judge Edgerton. (*Local 164, Brotherhood of Painters v. N.L.R.B.*, 293 F. 2d 133)

No doubt, the Board will in its Brief, in Opposition to this Petition for Certiorari cite many cases decided by the Board, which were later enforced in the courts of appeals, which the Board contends held a performance bond to be outside the scope of mandatory bargaining. Many of those Board cases did not involve a performance bond at all and others involved bonds of different nature from the bond involved in the case at bar. Regardless of the nature of the provision involved in the Board cases, all of those cases were decided

by the Courts of Appeals on *different grounds* which had nothing to do with a performance bond. In other words, the Courts of Appeals enforced the Board decisions for reasons which did not bring in issue the question of the performance bond and the opinions of the Courts of Appeals do not decide, one way or the other, whether a performance bond is a mandatory subject of bargaining.

While the precise question in the case at bar involves a performance bond, the broader and more significant issue at stake is: To what extent is a party to a collective bargaining contract permitted to "insist" upon means and methods of obtaining compliance with all of the other terms and provisions in a collective bargaining agreement?

It would seem to be obvious that provisions which tend to insure performance of a collective bargaining agreement "materially affect" all of its other provisions and of necessity such enforcement provisions "materially affect" all of the other provisions in the contract relating to "wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." Cf. *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F. 2d 821, 823 (Fourth Circuit).

It would also seem to petitioner that any matter relating to requiring adherence to provisions contained in a collective bargaining contract are of major significance in accomplishing the ultimate goal of the Act, which is that of promoting industrial peace and harmony. The enforcement of a collective bargaining contract has been a matter of sufficient concern to Congress as to enact Section 301 of the Act which permits aggrieved parties to sue for damages for the vio-

lation of a collective bargaining contract. Surely, means and methods of securing compliance with the terms of a collective bargaining contract do not contravene the policies of the Act.

To petitioner's point of view, a gross injustice was brought about by the decision of the D. C. Circuit in *Local 164, Brotherhood of Painters*, supra., wherein the Union sought to obtain a performance bond from the employer who the Union contended had breached various provisions of prior collective bargaining contracts. The Union sought to make a direct frontal attack upon a vital problem and yet the Board and the Court of Appeals held that insistence upon a performance bond was a *per se* violation of the Act, regardless of the good faith reasons why such provision was sought and needed.

After *Borg-Warner*, supra, was decided, this Court later said in *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 487, 488, 490:

> "* * * it remains clear that section 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements * * *. Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental powers to regulate the substantive solution of their differences. * * * Our labor policy is not presently erected on a foundation of government control of the results of negotiation."

PRAYER

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit to the

end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the opinion and decision of said Court relating to enforcement of the Board's decision be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: November 15, 1965.

THOMAS E. SHROYER,
1341 New Hampshire
Ave., N. W.,
Washington, D. C.,
Counsel for Petitioner.

Of Counsel:
JOE P. MATHEWS
903 Dallas Federal Savings Bldg.
Dallas 1, Texas

CERTIFICATE OF SERVICE

This is to certify that simultaneous with the filing of this petition three true copies hereof have been personally delivered to the office of Solicitor General, Department of Justice, Washington, D.C. and three true copies hereof have been personally delivered to Attorney of Record who represented the National Labor Relations Board in the court below, Marcel-Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C.

Thomas E. Shroyer
Counsel for Petitioner

Appendix A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21365

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus,

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(July 12, 1965.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The Board petitions the Court for enforcement of its order which found that the Respondent Company violated section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain collectively with the Union;[1] and violated section 8(a)(3)

[1] United Packinghouse, Food and Allied Workers, AFL-CIO.

and (1) of the Act by refusing to re-employ Andrew Baylock, Jr.[2]

The questions to be decided are: 1. whether substantial evidence supports the Board's finding that the Company insisted as a condition to an agreement that the collective bargaining contract contain a performance bond provision; 2. if so, whether the Company, by so insisting upon a performance bond, violated section 8(a)(5) and (1) of the Act; and 3. whether substantial evidence supports the Board's finding that the Company violated section 8(a)(3) and (1) of the Act by refusing to re-employ Andrew Baylock, Jr.

1. Performance Bond—The Facts

The Company has its principal office in Shreveport, Louisiana, where it is engaged in the warehousing and compressing of cotton. It also maintains places of business in Natchitoches, Alexandria, and Opelousas, all in Louisiana. About April 30, 1962, the Board, following an election, certified the Union as the exclusive bargaining representative for employees in a unit comprising production and main-

[2] Section 8(a), 29 U.S.C. 158(a), provides in pertinent part: "(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

"* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

tenance employees, laborers, seasonal and casual employees at the Company's cotton compresses in the four Louisiana cities. J. K. Boone was general manager of the Company. R. E. Dupuy and Eddie Stahl were plant superintendent and foreman, respectively, at the Shreveport compress. Edward D. Shanklin and Alvin A. Vicknair were field representatives and chief negotiators for the Union.

In the period June 4 to October 10, 1962, the parties held six bargaining meetings with Vicknair and Shanklin, plus two employees representing the Union, and Boone and Dupuy appearing on behalf of the Company. At the June 4 meeting, the Union presented the Company with a brief summary of its demands. Boone complained that the summary was too vague and the Union agreed to submit a complete contract proposal. About June 7, the Union mailed a proposed contract to the Company. At the June 13 meeting, the Company presented its contract proposals providing, inter alia, for a performance bond, a no-strike no-lockout clause, and a nonobservance of picket line provision.[3] At the June 13 meeting, according to Shanklin, "the company strenuously said that they wanted to have, they had to have, before we could reach an agreement, certain portions of the contract which we strenuously objected to. Now these were the portions or sections that the company said they had to have." At the June 27 meeting, Shanklin testified that they went down the Company's proposal and agreed on a number of the clauses, but,

[3] The three proposed provisions are attached as Appendix A to this Opinion.

"Non-Observance of Picket Lines; we told the company we could not go along with that. That was completely contrary to what we considered a Non-Observance of Picket Lines which we could not go along with. That clause the company insisted upon in order to reach an agreement. This was a must that had to be part of the contract.

"Performance Bond; we didn't agree with that. We told the company that was out completely. The company took a strong position that they had to have that and then made the indication that we were irresponsible people and that this would be one way to be sure that we would honor the contract if we signed the Performance Bond. The Performance Bond had to be part of the contract otherwise there would be no contract as far as they would be concerned.

"This is in the way of Mr. Boone speaking for the company."

Boone testified:

"A. We had a disagreement on Non-Observance of Picket Lines and we had a very lengthy discussion and disagreement on our proposal on the Performance Bond.

"Q. All right. In connection with those two provisions, will you tell us, as closely as you can remember, what you told the union people about those provisions and what they told you?

"A. Well on the Non-Observance of the Picket Lines, I told the union that I was looking for some protection that would enable us to get our employees on the job in the event that we had heavy construction going on and those people were on strike, in the event the railroads were on strike or possibly even in the event that this same union was on strike at another plant for which we handled cotton for, that I was not asking them to cross their own picket lines but I was merely asking them to come to work and do the work which they were

hired to perform. I was told that they have never agreed to any such article, any such language and that they had no intentions and I was told should this event ever come up that they and myself could sit down and work these things out at that particular time.

"Q. Now, Mr. Boone, when you say 'they' who actually told you that, if you remember, what union representative?

"A. Mr. Vicknair.

"Q. What about the Performance Bond, you remember what you said, if anything, about that and what the union people said to you about it?

"A. Well, on the Performance Bond we merely asked for some type of protection in this contract that we were about to enter into with these people. It is not something that is uncommon for us. It is merely protecting our investment in whatever the contract covers whether it be this contract or the contract with some builder or someone that we are not normally familiar with. I want you to bear in mind up until a short period ago I had never seen any of these people and I know nothing about them. I take the same position in my business when I go out to let a contract or repair job or anything of that nature. If I don't know the people I feel like I need some protection and that was why I wanted this type of bond here.

"Q. Is that about what you told them? Did you tell them that?

"A. Yes, sir.

"Q. You told the union people that?

"A. I told them that in each meeting we had."

At the July 12 meeting, the parties reiterated their positions with respect to the three disputed clauses. Two subsequent meetings, in which the Federal Mediation and

Conciliation Service participated, were held on July 31 and October 10. The Company did not change its position. Boone testified, however, that while he wanted the performance bond and the other two disputed provisions, he didn't say that they had to be in the contract. "I just wanted some protection in this contract. But as far as demanding, I never demanded anything at all." On the other hand, Shanklin testified that the positions of both parties remained the same, and Vicknair testified as to the final meeting of October 10:

> "A. Before we were adjourned we were all called back together by Mr. Mapp [of the Federal Mediation and Conciliation Service]. We told the company that they would hear from us, meaning either for a meeting or something else and the company insisted at that time they must have the Performance Bond, the Non-Observance of Picket Lines plus the No Strike-Lock Out Clause as suggested by the company. Then the meeting broke and I filed charges against the company.
>
> "Q. All right. At any time, did the company ever make any overtures either relaxing or relinquishing their position concerning the Non-Observance of Picket Lines, No Strike No Lock Out Clause or the Performance Bond?
>
> "A. None.
>
> "Q. Did they insist they must have this as part of any contract that they would sign?
>
> "A. Absolutely."

There was thus ample evidence to support the finding of the Trial Examiner and of the Board that as a condition to reaching any agreement the Company insisted upon the inclusion of the three disputed provisions.

2. Performance Bond—The Law

The law is settled that neither the Company nor the Union can lawfully condition willingness to enter into a contract upon the other party's consent to include some provision which is not a mandatory subject of bargaining. As clearly stated in *NLRB v. Wooster Division of Borg-Warner Corp.*, 1958, 356 U.S. 342, 349:

> "Read together, these provisions [sections 8(a) (5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board v. American Insurance Co.*, 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.
>
> "The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement."

The fact that agreement was not reached on other disputed clauses is not an answer, for the Company's "in-

sistence" as a condition to reaching an agreement need not be the sole cause for failure to agree.[4]

The difficult part of the problem is to determine whether any particular proposal is a mandatory subject of bargaining within the statutory description of "wages, hours, and other terms and conditions of employment."[5]

The Trial Examiner thought that the no-strike, no-lockout and nonobservance of picket lines are mandatory subjects of bargaining, but noted that the record shows the Company entwined these proposals with the performance bond clause and that all three provisions were considered and discussed by the parties as a one-package proposition. The Board limited its adoption of the Trial Examiner's conclusion by stating: "Because of the other conditions with which they were entwined, we do not, as applied to this case, adopt the Trial Examiner's assertion that 'the no-strike, no-lockout and nonobservance of picket line [were] mandatory subjects of bargaining.'" Both the Trial Examiner and the Board held that a performance bond such as the Company proposed is not within the compass of the obligation to bargain with respect to "wages, hours, and other terms and conditions of employment," and that and employer's insistence upon such a provision as a con-

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[4] Industrial Union of Marine & Shipbuilding Workers v. NLRB, 3 Cir. 1963, 320 F. 2d 615, 618, cert. denied 375 U.S. 984; Philip Carey Mfg. Co. v. NLRB, 6 Cir. 1964, 331 F. 2d 720, 728.

[5] Sections 8(a)(5) and 8(d) of the Act; Compare United Mine Workers v. Pennington, U.S. No. 48, Oct. Term., 1964, decided June 7, 1965; and Meat Cutters Union v. Jewel Tea Co., U.S. No. 240, Oct. Term, 1964, decided June 7, 1965. See also Annotation on "Subjects of Mandatory Collective Bargaining under Federal Labor Relations Act," 12 A.L.R. 2d 265-280.

dition to signing an agreement violates section 8(a)(5) of the Act.

The Company urges: "No United States Supreme Court decision has ever held that a performance bond to insure the faithful performance of a collective bargaining contract is a topic outside of the area of mandatory bargaining." That is true, but the Courts of Appeals and the Board[6] have uniformly and repeatedly indicated and held that a performance bond clause of the type here involved is not within the compass of mandatory collective bargaining.[7] We agree with those many decisions. The Company cannot insist to the point of impasse upon an agreement with any person (including a surety) other than the Union which is the exclusive bargaining representative for the employees. See *NLRB v. Taormina*, 5 Cir. 1953, 207 F. 2d

[6] That "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise" See opinion of Mr. Justice White in Meat Cutters Union v. Jewel Tea Co., p. 7 of slip opinion cited supra n. 5. "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance * * *" p. 7 of slip opinion of the Court in United Mine Workers v. Pennington, cited supra n. 5. Footnote 18 of Mr. Justice Goldberg's dissenting opinion in those two cases also notes that "* * * decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant * * *"

[7] Local 164, Brotherhood of Painters v. NLRB, D.C. Cir. 1961, 293 F. 2d 133; International Brotherhood of Teamsters (Conway's Express), 87 N.L.R.B. 972, 978-79, aff'd on other grounds, *sub nom.*; Rabouin v. NLRB, 2 Cir. 1952, 195 F. 2d 906; NLRB v. Davison, 4 Cir. 1963, 318 F. 2d 550; NLRB v. Dalton Tel. Co., 5 Cir. 1951, 187 F. 2d 811; NLRB v. Tower Hosiery Mills, Inc., 4 Cir. 1950, 180 F. 2d 701; NLRB v. Taormina, 5 Cir. 1953, 207 F. 2d 251; NLRB v. F. M. Reeves & Sons, Inc., 10 Cir. 1959, 273 F. 2d 710; NLRB v. IBS Mfg. Co., 5 Cir. 1954, 210 F. 2d 634, 639 (dissenting opinion); Jasper Blackburn Products Corp., 21 N.L.R.B. 1240; Scripto Mfg. Co., 36 N.L.R.B. 411; Interstate Steamship Co., 36 N.L.R.B. 1307; Dalton Telephone Co., 82 N.L.R.B. 1001; Standard Generator Service Co., 90 N.L.R.B. 790; Arlington Asphalt Co., 136 N.L.R.B. 742.

251, 254. Other sound reasons support the uniform and repeated holdings.[8]

The Board properly concluded that the Company violated section 8(a)(5) and (1) of the Act by insisting as a condition to an agreement that the collective bargaining contract contain a performance bond provision.

3. Refusal to Re-employ Andrew Baylock, Jr.

Baylock had worked as a seasonal employee for the Company for "I would say about 16-17 years, off and on." Up to 1961 he had not filled out a written application. He testified that, "* * * it was '61 when they started having the boys fill out applications." In that year he gave his written application to Mr. Dupuy, the plant superintendent, and was employed. Baylock testified that the next year, 1962, before Labor Day, he saw "some trucks out there with cotton on it," and asked Eddie Stahl, the foreman, for a job. "Q. Tell us what conversation you had with Mr. Stahl? A. Well, I walked up to him and asked him if he was putting men back on. He said, 'No, they didn't have nothing to do.' Now, he told me, he said, 'Well, Homer Ford as [sic] able enough to hire you boys.'"[9]

[8] Many such reasons are set forth in Judge Sobeloff's opinion in NLRB v. Davison, 4 Cir. 1963, 318 F. 2d 550, 556-57.

[9] Homer Ford was a Union organizer. In another case against this same Company, an employee Sims had made written application in the fall of 1961 on the Company form to Plant Superintendent Dupuy, and was told. "You don't want to work for us if you are going to work for Homer Ford and the union." Under the circumstances of that case, we held that the refusal to re-hire Sims was an unfair labor practice. NLRB v. American Compress Warehouse, etc., 1963, 321 F. 2d 547, 549.

Baylock left the plant and did not submit a written application for employment. The Trial Examiner held that the filing of an application would have been meaningless and Baylock was justified in accepting Stahl's decision as final, stating: "Baylock's undenied testimony shows that Stahl made it plain there was no job available for Baylock *because* of his association with Ford, a well-known Union adherent." (Emphasis supplied.)

It appeared that applications for employment were required to be in writing, and that Plant Superintendent Dupuy had exclusive authority to decide whether to reemploy any applicant. There was no proof to sustain the Trial Examiner's exclusion that the unavailability of a job was *because* of Baylock's association with Ford. Baylock did not so testify on direct examination (see quotation *supra*). On cross-examination he repeated: "Q. What did you ask Eddie Stahl to do? A. I asked Mr. Eddie Stahl was he putting on any men back to work and he said, 'No.' He said he didn't have anything to do and he said Homer Ford, Jr. was able enough to hire you all boys and I turned around and walked off."

If no men were being put back to work, and there was no work for them to do, Stahl's reference to Homer Ford's ability to hire, though not called for and ill advised, was not sufficient basis for a conclusion that Baylock was discriminatorily refused reemployment. We therefore deny enforcement of the order to reinstate Baylock and make him whole for any loss of pay suffered. In other respects, the order of the Board will be enforced.

ENFORCED IN PART AND DENIED IN PART.

APPENDIX A.

Provisions Proposed by the Company.

"Both the Company and the Union agree to obtain and deliver to each other a performance bond written by a corporate surety company, payable to the other party in a penalty amount of ..... dollars in order to insure and guarantee the faithful performance of this contract by both parties.

"The Union agrees that the employees of the Company will cross any picket line put up around or near any of the Company's plants by any other union and will work in a normal way; the Union further agrees that the employees of the Company will not refuse to handle or work on any goods which may be claimed as unfair or hot by any union, including the union which is a party to this contract. The Union agrees to be responsible for the actions of the Company's employees, regardless of whether such actions are authorized by the Union. The failure of the Company's employees to abide by the provisions of this article shall constitute a violation by the Union of this contract.

"There shall be no strike, slow-down, work stoppage, interruption of work or any other activity on the part of the employees which causes a reduction in the normal amount of work or business of the Company. The Union shall be responsible for any such activities on the part of the employees, regardless of whether the Union has authorized the employees to engage in any such activities; it being intended that any such activities on the part of employees shall constitute a violation by the Union of this contract.

"There shall be no lock-out by the Company or any other activity on the part of the Company which produces the effect of a lock-out. The Company shall be responsible for any such activity on the part of any of its management or supervisory personnel, regardless of whether the Company has authorized such personnel to engage in such activities. Any such activities on the part of management personnel or supervising personnel shall constitute a violation by the Company of this contract."

Appendix B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21365

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus,

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

Before RIVES, BROWN and WISDOM, Circuit Judges.

JUDGMENT

The cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on September 9, 1963, in the proceedings known upon the records of the Board as Case Nos. 15-CA-2168 and 15-CA-2183, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order

of the Board in this cause be, and the same is hereby, enforced in part and denied in part in accordance with the opinion of this Court.

"Per Rives, Circuit Judge"

July 12, 1965

Appendix C

U. S. Court of Appeals
F I L E D
Sep. 7, 1965
Edward W. Wadsworth
Clerk

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21365

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus,

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(September 7, 1965)

ON PETITION FOR REHEARING

Before RIVES, BROWN and WISDOM, Circuit Judges.
PER CURIAM:

The petition for rehearing filed by the respondent in this cause is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 744

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–26) is reported at 350 F. 2d 365. The Board's Decision and Order (R. 78–79, 42–75)[1] is reported at 144 NLRB 433.

JURISDICTION

The judgment of the court of appeals was issued on July 12, 1965 (Pet. 27–28). A petition for rehearing was denied on September 7, 1965 (Pet. 29). The petition for a writ of certiorari was filed on Novem-

[1] "R." and "B.A." references are to the Transcript of Record and the Board's appendix filed in the court below.

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ber 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act by insisting as a condition to an agreement that the collective bargaining contract contain a performance bond provision.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party * * *.

STATEMENT

The petitioner corporation is engaged in the business of warehousing and compressing cotton. In April 1962, following an election, the Board certified the Union[2] as the exclusive bargaining representative for a unit of Company employees (R. 44–45). Between June and October of the same year, bargaining meetings were held in which Company officials Boone and Dupuy and Union officials Vicknair and Shanklin were the chief negotiators (R. 45; B.A. 4, 10–11, 33).

At the first of these meetings on June 4, the Union presented the Company with a summary of the contract terms it wanted (R. 45; B.A. 12). At a subsequent meeting on June 13, the Company presented its contract proposals (R. 45; B.A. 15). The Company's proposals included, *inter alia*, a performance bond clause, a no-strike no-lockout clause, and a non-observance of picket line clause.[3] Although the Union ob-

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[2] United Packinghouse, Food and Allied Workers, AFL-CIO.

[3] The three provisions were as follows (R. 47):

"Both the Company and the Union agree to obtain and deliver to each other a performance bond written by a corporate surety company, payable to the other party in a penalty amount of _____ dollars in order to insure and guarantee the faithful performance of this contract by both parties.

* * * * *

"The Union agrees that the employees of the Company will cross any picket line put up around or near any of the Company's plants by any other union and will work in a normal

jected to the inclusion of these provisions in a contract, petitioner indicated at this meeting "that they wanted to have, they had to have" them before agreement could be reached (B.A. 15–17, 24–28).

At the next meeting on June 27 and 28, the Union and Company continued to discuss the contract proposed by the Company, reaching tentative agreement on some provisions (R. 46; B.A. 18–21). With respect to the performance bond and the other two clauses, however, the Company continued to insist that they be included in a contract and the Union contin-

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way; the Union further agrees that the employees of the Company will not refuse to handle or work on any goods which may be claimed as unfair or hot by any union, including the union which is a party to this contract. The Union agrees to be responsible for the actions of the Company's employees, regardless of whether such actions are authorized by the Union. The failure of the Company's employees to abide by the provisions of this article shall constitute a violation by the Union of this contract.

* * * * *

"There shall be no strike, slow-down, work stoppage, interruption of work or any other activity on the part of the employees which causes a reduction in the normal amount of work or business of the Company. The Union shall be responsible for any such activities on the part of the employees, regardless of whether the Union has authorized the employees to engage in any such activities; it being intended that any such activities on the part of employees shall constitute a violation by the Union of this contract.

"There shall be no lock-out by the Company or any other activity on the part of the Company which produces the effect of a lock-out. The Company shall be responsible for any such activity on the part of any of its management or supervisory personnel, regardless of whether the Company has authorized such personnel to engage in such activities. Any such activities on the part of management personnel or supervisory personnel shall constitute a violation by the Company of this contract."

ued to oppose their inclusion (R. 48-50; B.A. 19-21, 28-32, 45-46, 48-50). The Company took the position that a performance bond was necessary to provide some type of protection against irresponsible union action (R. 48; B.A. 21), and that "the performance bond had to be part of the contract otherwise there would be no contract as far as they would be concerned" (B.A. 21). The Company "insisted that they would not bargain or trade" on the performance bond provision and the other two clauses (R. 50; B.A. 45).

On July 12, when the parties next met, they reiterated their positions with respect to the three clauses (R. 50; B.A. 34-36, 41). With respect to the performance bond, "the company's position was that it was one thing they must have in this contract" (B.A. 36). A subsequent meeting held on July 31, in which the Federal Mediation and Conciliation Service participated, failed to change the parties' respective views (R. 50; B.A. 23-24, 32).

A final meeting was held on October 10. At that time the Union suggested that it would drop its request for a union-shop provision if the Company eliminated its demand for the performance bond (R. 51; B.A. 37, 40). The Company, however, continued to insist on inclusion of the performance bond provision and the other two disputed clauses (R. 51; B.A. 37-38, 41).

The Board, affirming its Trial Examiner, found that the Company conditioned execution of a contract with the Union upon inclusion in the contract of the three disputed clauses, including the performance bond clause. The Board further found that, since the per-

formance bond clause was a non-mandatory bargaining subject, the Company's insistence on such clause violated Section 8(a) (5) and (1) of the Act. (R. 52–53, 78.) The Board ordered the Company to cease its unlawful conduct and to bargain, on request, with the Union (R. 70–71). The court of appeals sustained the Board's findings and enforced its order regarding the violation of Section 8(a) (5) and (1) (Pet. 16–24).[4]

ARGUMENT

The decision of the court below is correct and it is not in conflict with any other decision. There is no occasion for further review.

1. In *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, the Court held that a party to collective bargaining negotiations cannot condition willingness to negotiate or contract about matters which are the subject of compulsory bargaining upon the other party's acceding to demands which are outside that area. Petitioner's basic argument is that, although it proposed a performance bond provision, it did not insist on that provision as a condition of reaching an agreement. However, the Trial Examiner and the Board found to the contrary, and the court of appeals concluded that "There was * * * ample evidence to support the finding of the Trial Examiner and of the Board that as a condition to reaching any agreement the Com-

[4] The Board also found that the Company violated Section 8(a)(3) by refusing to reemploy one Baylock. The court of appeals did not sustain this finding (Pet. 24–25). The issue respecting Baylock is not before the Court.

pany insisted upon the inclusion of the three disputed provisions" (Pet. 20). Accordingly, petitioner's contention raises only an evidentiary issue which does not warrant review by this Court.

Petitioner stresses the absence of a finding of causal relationship between the insistence on a non-mandatory subject and the failure to reach agreement (Pet. 8-9). But if inclusion of a non-mandatory subject was "a condition to reaching any agreement," it was clearly a cause of the failure to reach agreement. Nor is there substance to petitioner's contention that, since the parties had not as yet reached agreement on all the mandatory bargaining subjects, the non-mandatory subject could not have caused the impasse (Pet. 7-8). As the court below properly observed (Pet. 21-22), the insistence on the non-mandatory subject "need not be the sole cause for the failure to agree." That is, where, as here, the facts show that no final agreement was possible unless the Union capitulated to the Company's demand for the performance bond, it is irrelevant that there were also other subjects blocking agreement. For even if the latter were ultimately eliminated, the non-mandatory subject would still stand as an obstacle to a final resolution. See *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615, 618 (C.A. 3), certiorari denied *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board*, 375 U.S. 984.

2. Petitioner also challenges the holding of the court below that a performance bond is a non-mandatory subject of bargaining. Although the question has

not yet been decided by this Court, the court below correctly noted that "the Courts of Appeals and the Board have uniformly and repeatedly indicated and held that a performance bond clause of the type here involved is not within the compass of mandatory collective bargaining" (Pet. 23)[4] and this Court has repeatedly denied certiorari.[5] Furthermore, there is a reasonable basis for that conclusion. Mandatory subjects of bargaining are those involving "wages, hours, and other terms and conditions of employment" (National Labor Relations Act, Section 8(d), and a

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[4] The court cited (Pet. 23, n. 7): "*Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, D.C., Cir. 1961, 293 F. 2d 133; *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972, 978–979, aff'd on other grounds, *sub nom.; Rabouin* v. *National Labor Relations Board*, 2 Cir. 1962, 195 F. 2d 906; *National Labor Relations Board* v. *Davison*, 4 Cir. 1963, 318 F. 2d 550; *National Labor Relations Board* v. *Dalton Tel. Co.*, 5 Cir. 1951, 187 F. 2d 811; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 4 Cir. 1950, 180 F. 2d 701; *National Labor Relations Board* v. *Tuarmina*, 5 Cir. 1953, 207 F. 2d 251; *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.*, 10 Cir. 1959, 273 F. 2d 710; *National Labor Relations Board* v. *IBS Mfg. Co.*, 5 Cir. 1964, 340 F. 2d 634, 639 (dissenting opinion); *Jasper Blackburn Products Corp.*, 21 NLRB 1240; *Scripto Mfg. Co.*, 36 NLRB 411; *Interstate Steamship Co.*, 36 NLRB 1307; *Dalton Telephone Co.*, 82 NLRB 1001; *Standard Generator Service Co.*, 90 NLRB 790; *Arlington Asphalt Co.*, 136 NLRB 742."

[5] *Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A. D.C.), certiorari denied, 368 U.S. 824; *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.*, 47 LLRM 2480, certiorari denied, 366 U.S. 914; *National Labor Relations Board*, v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), certiorari denied, 340 U.S. 811.

demand for a performance bond does not seem to come within those categories. It deals exclusively with sanctions for violations. Unlike grievance and arbitration clauses and other procedural rules for resolving disputes over the meaning of an agreement or filling in its interstices, performance bonds do not relate directly or indirectly to any conditions of employment and have not been traditional subjects of collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
HERMAN M. LEVY,
Attorney,
National Labor Relations Board.

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